

2-C-16 | LITIGATION RECORDS**a. Attorney-client communications**

The Public Records Act applies to communications between attorneys and governmental agencies; there is no judicially created privilege which exempts these documents from disclosure. *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979) (only the Legislature and not the judiciary can exempt attorney-client communications from Ch. 119, F.S.). See also *City of North Miami v. Miami Herald Publishing Company*, 468 So. 2d 218 (Fla. 1985) (although s. 90.502, F.S., of the Evidence Code establishes an attorney-client privilege for public and private entities, this evidentiary statute does not remove communications between an agency and its attorney from the open inspection requirements of Ch. 119, F.S.).

Moreover, public disclosure of these documents does not violate the public agency's constitutional rights of due process, effective assistance of counsel, freedom of speech, or the Supreme Court's exclusive jurisdiction over The Florida Bar. *City of North Miami v. Miami Herald Publishing Company*, *supra*. And see *Seminole County, Florida v. Wood*, 512 So. 2d 1000, 1001 (Fla. 5th DCA 1987), review denied, 520 So. 2d 586 (Fla. 1988) (the rules of ethics provide that an attorney may divulge a communication when required by law; the Legislature has plenary authority over political subdivisions and can require disclosure of otherwise confidential materials); and AGO 98-59 (records in the files of the former city attorney, who served as a contract attorney for the city, which were made or received in carrying out her duties as city attorney and which communicate, perpetuate, or formalize knowledge constitute public records and are required to be turned over to her successor). Cf *City of St. Petersburg v. Dorchester Holdings, LLC*, 331 So. 3d 799 (Fla. 2d DCA 2021), discussing the application of R. Regulating Fla. Bar 4-42 and Fla. Bar Ethics Opinion 09-1.

On the other hand, the Florida Supreme Court has ruled that files in the possession of the Capital Collateral Representative (CCR) in furtherance of its representation of an indigent client are not subject to public disclosure under Ch. 119, F.S. The Court noted that the files are not governmental records for purposes of the public records law but are the "private records" of the CCR client. *Kight v.*



Dugger, 574 So. 2d 1066 (Fla. 1990). And see *Times Publishing Company v. Acton*, No. 99-8304 (Fla. 13th Cir. Ct. November 5, 1999), available online in the Cases database at the open government site at myfloridalegal.com (private attorneys retained by individual county commissioners in a criminal case were not "acting on behalf " of a public agency so as to become subject to the Public Records Act, even though the board of county commissioners subsequently voted to pay the commissioners' legal expenses in accordance with a county policy providing for reimbursement of legal expenses to individual county officers who successfully defend criminal charges filed against them arising out of the performance of their official duties).

b. Attorney work product

The Supreme Court has ruled that the Legislature and not the judiciary has exclusive authority to exempt litigation records from the scope of Ch. 119, F.S. *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979). See also *Edelstein v. Donner*, 450 So. 2d 562 (Fla. 3d DCA 1984), approved, 471 So. 2d 26 (Fla. 1985), noting that in the absence of legislation, a work product exemption is "non-existent;" and *Hillsborough County Aviation Authority v. Azzarelli Construction Company*, 436 So. 2d 153, 154 (Fla. 2d DCA 1983), stating that the Supreme Court's decision in *Wait* "constituted a tacit recognition that work product can be a public record."

With the enactment of s. 119.071(1)(d), F.S., the Legislature created a narrow statutory exemption for certain litigation work product of agency attorneys. See *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1029 (Fla. 1986), in which the Court noted that the exemption was enacted because of "developing case law affording public entities no protection under either the work product doctrine or the attorney-client privilege...." See also *City of North Miami v. Miami Herald Publishing Company*, 468 So. 2d 218, 219 (Fla. 1985) (noting application of exemption to "government agency, attorney-prepared litigation files during the pendency of litigation"); and *City of Miami Beach v. DeLapp*, 472 So. 2d 543 (Fla. 3d DCA 1985) (opposing counsel not entitled to city's legal memoranda as such material is exempt work product). Cf. *Dettelbach v. Department of Business and Professional Regulation*, 261 So. 3d 676, 682 (Fla. 1st DCA



2018), noting that "it was important" that an agency attorney's memorandum which was prepared exclusively to assess the strength of the agency's evidence in a licensing case remain exempt from disclosure during the pendency of the adversarial administrative proceedings.

Section 119.071(1)(d)1., F.S., states, in relevant part:

A public record that was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt [from disclosure] until the conclusion of the litigation or adversarial administrative proceedings.

Note that this statutory exemption applies to attorney work product that has reached the status of becoming a public record; as discussed more extensively on pages 127-128, certain preliminary trial preparation materials, such as handwritten notes for the personal use of the attorney, are not considered to be within the definitional scope of the term "public records" and, therefore, are outside the scope of Ch. 119, F.S. See *Johnson v. Butterworth*, 713 So. 2d 985 (Fla. 1998).

Under the terms of the statute, the work product exemption "is not waived by the release of such public record to another public employee or officer of the same agency or any person consulted by the agency attorney." Section 119.071(1)(d)2., F.S. See also AGO 94-77 (work product exemption continues to apply to records prepared by the county attorney when these records are transferred to the city attorney pursuant to a transfer agreement whereby the city is substituted for the county as a party to the litigation).

An agency asserting the work product exemption must identify the potential parties to the litigation or proceedings. Section 119.071(1)(d)2., F.S. However, the agency is not required to identify each document in a record that it asserts to be exempt under the work product exemption. *Dettelbach v. Department of Business and Professional Regulation*, 261 So. 3d 676, 683 (Fla. 1st DCA 2018). Whether to impose such a requirement “is a matter properly addressed to the legislature rather than this court.” *Id.*

In the event of litigation disputing the claimed work product exemption, the court must conduct an in camera inspection of the records. *Environmental Turf, Inc. v. University of Florida Board of Trustees*, 83 So. 3d 1012 (Fla. 1st DCA 2012).

If a court finds that the record was improperly withheld, the party seeking the record shall be awarded reasonable attorney’s fees and costs in addition to any other remedy ordered by the court. Section 119.071(1)(d)2., F.S. As one court has noted, the inclusion of an attorney’s fee sanction “was prompted by the legislature’s concern that government entities might claim the work product privilege whenever public access to their records is demanded.” *Smith & Williams, P.A. v. West Coast Regional Water Supply Authority*, 640 So. 2d 216, 218 (Fla. 2d DCA 1994).

(1) Scope of Exemption

(a) Attorney Bills and Payments

Only those records which reflect a “mental impression, conclusion, litigation strategy, or legal theory” are included within the parameters of the work product exemption. Accordingly, in AGO 85-89, the Attorney General’s Office concluded that a contract between a county and a private law firm for legal counsel and documentation for invoices submitted by such firm to the county do not fall within the work product exemption. Accord AGO 00-07 (records of outside attorney fee bills for the defense of the county, as well as its employees who are sued individually, for alleged civil rights violations are public records subject to disclosure).



If the bills and invoices contain some exempt work product--i.e., "mental impression[s], conclusion[s], litigation strateg[ies], or legal theor[ies],"--the exempt material may be deleted and the remainder disclosed. AGO 85-89. However, information such as the hours worked or the hourly wage clearly would not fall within the scope of the exemption. *Id.* And see *Herskovitz v. Leon County*, No. 98-22 (Fla. 2d Cir. Ct. June 9, 1998), available online in the Cases database at the open government site at myfloridalegal.com ("Obviously, an entry on a [billing] statement which identifies a specific legal strategy to be considered or puts a specific amount of settlement authority received from the client, would fall within the exemption. On the other hand, a notation that the file was opened, or that a letter was sent to opposing counsel, would not.").

Thus, an agency which "blocked out" most notations on invoices prepared in connection with services rendered by and fees paid to attorneys representing the agency, "improperly withheld" nonexempt material when it failed to limit its redactions to those items "genuinely reflecting its 'mental impression, conclusion, litigation strategy, or legal theory.'" *Smith & Williams, P.A. v. West Coast Regional Water Supply Authority*, 640 So. 2d at 218. And see *Davis v. Sarasota County Public Hospital Board*, 480 So. 2d 203 (Fla. 2d DCA 1985), review denied, 488 So. 2d 829 (Fla. 1986), holding in part that a citizen seeking to examine records of a public hospital board concerning the payment of legal fees was entitled to examine actual records, not merely excerpts taken from information stored in the hospital's computer.

(b) Records Prepared Prior to Litigation or for Other Purposes

Unlike the open meetings exemption in s. 286.011(8), F.S., for certain attorney-client discussions between a governmental board and its attorney, s. 119.071(1)(d), F.S., is not limited to records created for pending litigation before a



court or administrative agency, but may also apply to records prepared "in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings...." (e.s.) See AGO 98-21, discussing the differences between the public records work product exemption in s. 119.071(1)(d) and the Sunshine Law exemption in s. 286.011(8), F.S.

However, s. 119.071(1)(d), F.S., does not create a blanket exception to the Public Records Act for all attorney work product. AGO 91-75. The exemption is narrower than the work product privilege recognized by the courts for private litigants. AGO 85-89. In order to qualify for the work product exemption, the records must have been prepared exclusively for litigation or adversarial administrative proceedings, or prepared in anticipation of imminent litigation or adversarial administrative proceedings; records prepared for other purposes may not be converted into exempt material simply because they are also used in or related to the litigation. See, e.g., *Lightbourne v. McCollum*, 969 So. 2d 326, 333 (Fla. 2007), cert. denied, 553 U.S. 1059 (2008) (memoranda prepared by corrections department attorney regarding lethal injection procedures do not constitute exempt attorney work product because memoranda do not relate to any pending litigation nor appear to have been prepared exclusively for litigation); *MHM Correctional Services, Inc. v. State, Department of Corrections*, No. 2009 CA 2105 (Fla. 2d Cir. Ct. June 10, 2009), available online in the Cases database at the open government site at myfloridalegal.com (department wrongfully withheld portions of an e-mail stream regarding the bid process as protected work product or privileged communications as none of the emails were prepared in contemplation of litigation as required by the statute).

Moreover, only those records which are prepared by or at the express direction of the agency attorney and reflect "a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency" are exempt from disclosure



until the conclusion of the proceedings. See *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986) (trial court must examine city's litigation file in accident case and prohibit disclosure only of those records reflecting mental impression, conclusion, litigation strategy or legal theory of attorney or city); *Jordan v. School Board of Broward County*, 531 So. 2d 976, 977 (Fla. 4th DCA 1988) (record did not constitute exempt work product because it "was not prepared at an attorney's express direction nor did it reflect a conclusion and mental impression of appellee"); and *Lightbourne v. McCollum*, supra (exemption inapplicable to records that conveyed specific factual information rather than mental impressions or litigation strategies). Cf. *Tober v. Sanchez*, 417 So. 2d 1053, 1055 (Fla. 3d DCA 1982), review denied sub nom., *Metropolitan Dade County Transit Agency v. Sanchez*, 426 So. 2d 27 (Fla. 1983) (documents which are given by a client to an attorney in the course of seeking legal advice are privileged in the attorney's hands only if the documents were privileged in the client's hands; thus, otherwise public records made or received by agency personnel do not become privileged merely by transferring them to the agency attorney).

Thus, a circuit judge refused to apply the exemption to tapes, witness statements and interview notes taken by police as part of an investigation of a drowning accident at a city summer camp. See *Sun-Sentinel Company v. City of Hallandale*, No. 95-13528(05) (Fla. 17th Cir. Ct. October 11, 1995), available online in the Cases database at the open government site at myfloridalegal.com. Similarly, in AGO 05-23, the Attorney General's Office advised that notes taken by the assistant city attorney during interviews with co-workers of certain city employees in order to ascertain if employee discipline was warranted are not exempt from disclosure. See also AGO 91-75 (work product exemption not applicable to documents generated or received by school district investigators, acting at the direction of the



school board to conduct an investigation of certain school district departments). Cf. *City of Avon Park v. State*, 117 So. 3d 470 (Fla. 2d DCA 2013) (recognizing that where no charges were filed against any of the parties mentioned in a state attorney investigator's report, the report was a public record and the s. 119.071[1][d], F.S., exemption was inapplicable).

(c) Settlement Records

If the state settles a claim against one company accused of conspiracy to fix prices, the state has concluded the litigation against that company. Thus, the records prepared in anticipation of litigation against that company are no longer exempt from disclosure even though the state has commenced litigation against the alleged co-conspirator. *State v. Coca-Cola Bottling Company of Miami, Inc.*, 582 So. 2d 1 (Fla. 4th DCA 1990). And see *Tribune Company v. Hardee Memorial Hospital*, No. CA-91-370 (Fla. 10th Cir. Ct. August 19, 1991), available online in the Cases database at the open government site at myfloridalegal.com (settlement agreement not exempt as attorney work product even though another related case was pending, and agency attorneys feared disclosure of their assessment of the merits of the settled case and their litigation strategy would have a detrimental effect upon the agency's position in the related case). See also *Inf. Op. to Gastesi*, August, 27, 2015 (settlement demand furnished by plaintiff to agency); and *Florida Sugar Cane League, Inc. v. Florida Department of Environmental Regulation*, No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992) (technical documents or data which were not prepared for the purpose of carrying litigation forward but rather were jointly authored among adversaries to promote settlement are not exempted as attorney work product). Cf. *Prison Health Services, Inc. v. Lakeland Ledger Publishing Company*, 718 So. 2d 204, 205 (Fla. 2d DCA 1998), review denied, 727 So. 2d 909 (Fla. 1999) (private company under contract with sheriff to provide medical services for inmates at county jail must release records



relating to a settlement agreement with an inmate because all of its records that would normally be subject to the Public Records Act if in the possession of the public agency, are likewise covered by that law, even though in the possession of the private corporation).

(2) Duration of Exemption

The exemption from disclosure provided by s. 119.071(1)(d), F.S., is temporary and limited in duration. *City of North Miami v. Miami Herald Publishing Co.*, supra. The exemption exists only until the "conclusion of the litigation or adversarial administrative proceedings" even if disclosure of the information in the concluded case could negatively impact the agency's position in related cases or claims. See *State v. Coca-Cola Bottling Company of Miami, Inc.*, 582 So. 2d 1 (Fla. 4th DCA 1990); *Seminole County v. Wood*, 512 So. 2d 1000 (Fla. 5th DCA 1987), review denied, 520 So. 2d 586 (Fla. 1988); and *Lightbourne v. McCollum*, supra (rejecting a "continuing exemption" claim by the state). And see AGO 13-13 (Sunshine Law exemption for certain attorney-client meetings found in s. 286.011[8], F.S., "does not recognize a continuation of the exemption for 'derivative claims' made in separate, subsequent litigation"). Cf. *State v. Coca-Cola Bottling Company of Miami, Inc.*, supra (although state cannot claim work product exemption for litigation records after conclusion of litigation, Ch. 119 does not cover oral testimony; thus, opposing counsel not entitled to take depositions of state representatives regarding the concluded litigation).

Thus, a school board failed to meet its burden of showing that items contained in a school board litigation report were exempt from disclosure where there was no evidence that the cases in question were pending and open when the board received the public records request. *Barfield v. School Board of Manatee County*, 135 So. 3d 560 (Fla. 2d DCA 2014).

However, the phrase "conclusion of the litigation or adversarial administrative proceedings" encompasses post-judgment collection efforts such as a legislative claims bill. *Wagner v. Orange County*, 960 So. 2d 785



(Fla. 5th DCA 2007). And see AGO 94-33, concluding that for purposes of the attorney-client exemption from the Sunshine Law in s. 286.011(8), F.S., a pending lawsuit is concluded when the suit is dismissed with prejudice or the applicable statute of limitations has run; “[t]o allow a plaintiff who has voluntarily dismissed a suit to gain access to transcripts of strategy or settlement meetings in order to obtain an advantage in the refiling of a lawsuit would subvert the purpose of the statute.” Cf. *Chmielewski v. City of St. Pete Beach*, 161 So. 3d 521 (Fla. 2d DCA 2014) (rejecting city’s argument that because an agreement settling a quiet title action provided for further mediation should a dispute arise regarding the meaning of the agreement, the case was still pending for purposes of the Sunshine Law exemption in s. 286.011[8], F.S.).

In addition, the exemption extends “through prosecution of appeals.” Inf. Op. to Boutsis, December 13, 2012. Cf. s. 119.071(1)(d)1., F.S. (“For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General’s office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.”).

c. Other Statutory Exemptions Relating to Litigation Records

Section 768.28(16)(b), F.S., provides an exemption for claims files maintained by agencies pursuant to a risk management program for tort liability until the termination of all litigation and settlement of all claims arising out of the same incident.

The “plain language of the statute” indicates that the “entire claims file is exempt from disclosure until resolution of the claim or claims.” *City of Homestead v. McDonough*, 232 So. 3d 1069, 1071 (Fla. 3d DCA 2017). [emphasis supplied by the court]. Accordingly, the trial court erred by ordering production of certain records in the file on the theory that production would not harm the city. *Id.* See also *Wagner v. Orange County*, 960 So. 2d 785 (Fla. 5th DCA 2007), stating that the phrase “settlement of all claims arising out of the same incident” included a legislative claims bill.



The exemption afforded by s. 768.28(16), F.S., is limited to tort claims for which the agency may be liable under s. 768.28, F.S., and does not apply to federal civil rights actions under 42 U.S.C. s. 1983. AGOs 00-20 and 00-07. And see *Sun-Sentinel Company v. City of Hallandale*, No. 95-13528(05) (Fla. 17th Cir. Ct. October 11, 1995), available online in the Cases database at the open government site at myfloridalegal.com (exemption now found at s. 768.28[16][b], F.S., for risk management files did not apply to tapes, witness statements and interview notes taken by police as part of an investigation of a drowning accident at a city summer camp). Moreover, the exemption does not include outside attorney invoices indicating hours worked and amount to be paid by the public agency, even though the records may be maintained by the agency's risk management office pursuant to a risk management program. AGO 00-07. And see AGO 92-82 (open meetings exemption provided by s. 768.28, F.S., applies only to meetings held after a tort claim is filed with the risk management program).

Section 624.311(2), F.S., provides that the "records of insurance claim negotiations of any state agency or political subdivision are confidential and exempt [from disclosure] until termination of all litigation and settlement of all claims arising out of the same incident." A county's self-insured workers compensation program is the legal equivalent of "insurance" for purposes of this exemption. *Herskovitz v. Leon County*, No. 98-22 (Fla. 2d Cir. Ct. June 9, 1998), available online in the Cases database at the open government site at myfloridalegal.com. And see AGO 85-102 (s. 624.311, F.S., exemption includes correspondence regarding insurance claims negotiations between a county's retained counsel and its insurance carriers until termination of litigation and settlement of claims arising out of the same incident). Compare s. 284.40(2), F.S. (claim files maintained by the risk management division of the Department of Financial Services are confidential, shall be only for the use of the department, and are exempt from disclosure); and s. 1004.24(4), F.S. (claims files of self-insurance program adopted by Board of Governors, or the board's designee, are confidential and exempt).



d. Attorney Notes

Relying on its conclusion in *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633 (Fla. 1980), the Florida Supreme Court has recognized that “not all trial preparation materials are public records.” *State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990). In *Kokal*, the Court approved the decision of the Fifth District in *Orange County v. Florida Land Co.*, 450 So. 2d 341, 344 (Fla. 5th DCA 1984), review denied, 458 So. 2d 273 (Fla. 1984), which described certain documents as not within the term “public records” because they were not used to perpetuate, formalize, or communicate knowledge:

Document No. 2 is a list in rough outline form of items of evidence which may be needed for trial. Document No. 9 is a list of questions the county attorney planned to ask a witness. Document No. 10 is a proposed trial outline. Document No. 11 contains handwritten notes regarding the county's sewage system and a meeting with Florida Land's attorneys. Document No. 15 contains notes (in rough form) regarding the deposition of an anticipated witness. These documents are merely notes from the attorneys to themselves designed for their own personal use in remembering certain things. They seem to be simply preliminary guides intended to aid the attorneys when they later formalized the knowledge. We cannot imagine that the Legislature, in enacting the Public Records Act, intended to include within the term ‘public records’ this type of material. [Emphasis supplied by Court]

Similarly, in *Johnson v. Butterworth*, 713 So. 2d 985, 987 (Fla. 1998), the Court ruled that “outlines, time lines, page notations regarding information in the record, and other similar items” in the case file, do not fall within the definition of public record, and thus are not subject to disclosure. See also *Braddy v. State*, 219 So. 3d 803, 821 (Fla. 2017) (“handwritten attorney notes, draft documents, and annotated copies of decisional law... do not constitute public records”); *Ragsdale v. State*, 720 So. 2d 203, 205 (Fla. 1998) (“attorney's notes and other such preliminary documents are not public records and are never subject to public records disclosure”); *Valle v. State*, 705 So. 2d 1331, 1335 (Fla. 1997) (prosecutors' notes to themselves for their own personal use, including outlines of opening and closing arguments and notes of witness depositions are not public



records); *Lopez v. State*, 696 So. 2d 725, 727 (Fla. 1997) (handwritten notes dealing with trial strategy and cross-examination of witnesses are not public records); and *Atkins v. State*, 663 So. 2d 624, 626 (Fla. 1995) (notes of state attorney's investigations and annotated photocopies of decisional case law are not public records).

By contrast, documents prepared to communicate, perpetuate, or formalize knowledge constitute public records and are, therefore, subject to disclosure in the absence of statutory exemption. See *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980), stating that "[i]nter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business."

Thus, in *Coleman v. Austin*, 521 So. 2d 247, 248 (Fla. 1st DCA 1988), the court observed that "although notes from attorneys to themselves might not be public records when intended for their own personal use, inter-office and intra-office memoranda may constitute public records even though encompassing trial preparation materials." And see *Orange County v. Florida Land Company*, *supra*, in which the court concluded that trial preparation materials consisting of interoffice and intraoffice memoranda communicating information from one public employee to another or merely prepared for filing, even though not part of the agency's formal work product, were public records although such circulated trial preparation materials might be exempt from disclosure pursuant to s. 119.071(1)(d), F.S., while the litigation is ongoing. See also AGO 05-23 (handwritten notes prepared by city's assistant labor attorney during her interviews with city employees are public records "when those notes are made to perpetuate and formalize knowledge and to communicate that information to the city's labor attorney").

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